IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1091 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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STATE OF GUJARAT

Versus

KUMBHAR GHUGHA BHAGWAN

Appearance:

1. Criminal Appeal No. 1091 of 1985

MR MA BUKHARI,APP for Petitioner No. 1
MR BIPIN I MEHTA for Petitioner No. 1
MR AD SHAH for Respondent No. 1-3,5-8
ABATED for Respondent No. 4

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 06/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

1. The State of Gujarat, in this appeal, has challenged the judgment and order dated 7th June 1985 passed by the learned Sessions Judge, Bhavnagar in Sessions Case No. 41 of 1985 acquitting the respondents accused for offences punishable under sections 147, 148, 149 and 302 of the IPC.

2. During the pendency of the appeal, the respondent no.4 Kalu Jiva has expired on 20.5.1989 and, therefore, this Court, by its order dated 25.1.1993, ordered that the appeal against the said respondent shall stand abated.

3. As per the prosecution case, the incident took place on 29.11.1984 at about 8.00 a.m. at village Hajipar of Talaja taluka when deceased Baba Raghav was proceeding to village Ghana in a bullock cart for bringing saplings. The complainant Kana Kalu was following at a distance of about 40 feet to 50 feet by walking. At that time, all the accused came there with deadly weapons like axe, dharia and sticks. According to the prosecution, A1, A2, A4, A5 and A6 were having axe while A3 and A8 were having dharia and A7 was having stick. They started inflicting blows on deceased Baba Raghav. By that time, Kana Kalu also reached near the bullock cart. The complainant wanted to know as to for what purpose his nephew was being beaten. At that time, A6 threatened the complainant that he will also meet the same fate like the deceased. The complainant, on hearing this, started running towards Ambawadi. While he was running, A3 tried to catch hold of him by pulling his shirt. However, the complainant escaped and his shirt was torned. The complainant went to his wadi and thereafter he informed his mother about the incident. He also sent Goda, PW 7, son of the deceased and instructed him to inform Karna, PW 6, the cousin brother of the deceased. Accordingly, PW 7 informed Karna. Thereafter Karna and his brother Rana reached the scene of offence. In the meantime, the wife of the deceased and the wife of the brother of the deceased also reached the scene of offence. Karna asked the complainant to inform police. Accordingly, the complainant went to Talaja police station and lodged FIR Ex. 19 at about 1.15 p.m. on the same day. Dholubha Bhimji, PW 14 Ex.50, Investigating Officer started investigation after reaching the scene of offence. On completion of the investigation, he submitted chargesheet against the accused in the Court of learned Judicial Magistrate, First Class, Talaja, who in

turn, committed the case to the Court of Sessions for trial. The learned Sessions Judge framed charge at Ex. 3 against the accused for offence punishable under section 147, 148, 302 read with section 149 of IPC. The accused pleaded not guilty to the charge and claimed to be tried. After appreciating the evidence on record and the statement of the accused recorded under section 313 of the Code of Criminal Procedure, the learned Sessions Judge passed the judgment and order acquitting the accused by holding that the prosecution has failed to establish the charge against the accused. Hence the present appeal.

4. Learned APP Mr.M.A.Bukhari has taken us through the entire evidence on record and submitted that the evidence of the complainant Kanabhai, the sole eye witness is reliable, trustworthy and, therefore, required to be accepted. He submitted that the evidence of the complainant gets corroboration from the supporting evidence like PW 5 Lakhabhai as well as PW 7 Goda and PW 6 Karna. In the submission of learned APP, the trial court has committed an error in rejecting the aforesaid evidence on erroneous grounds and, therefore, the appeal is required to be allowed. To substantiate his submissions, he has placed reliance on the decision of the apex court in the case of Shivaji Vs. State of Maharashtra, AIR 1973 SC 2622 and in the case of Marwadi Kishore Parmanand Vs. State, 1995(1) GLR 210.

5. Mr. A.D.Shah, learned Counsel appearing for the accused, on the other hand, supported the judgment of the trial court, in toto.

6. On going through the evidence on record, we feel that the entire prosecution case is based on the evidence of complainant Kana Kalu who is the star witness of the prosecution who has witnessed the incident. We have narrated the facts from his evidence and, therefore, with a view to avoid repetition, we refrain from re-narrating his evidence. As per the say of the complainant, he accompanied deceased who was his nephew to purchase saplings. The deceased was in his cart and this witness was following him from the distance of 40 feet to 50 feet. When any person decides to accompany somebody in a cart, both will go in the cart by previously deciding to go together. The complainant Kana Kalu does not say either in his complaint Ex. 19 or in his evidence anything as to whether both he and the deceased had a previous meeting to go together to purchase saplings. From the evidence of Goda, PW 7, the son of the deceased, it becomes clear that the deceased had told his son Goda

to call the complainant Kana Kalu to accompany him for the purpose of purchase of saplings. Accordingly, Goda had gone to the house of Kana Kalu and conveyed this message. Accordingly Kana Kalu had gone subsequently to the house of the deceased. In the meantime, the deceased had already started moving in the bullock cart and, therefore, Kana Kalu had to follow him. Unfortunately, Goda is confronted with his police statement regarding this part of evidence and he had to admit that he had not stated about the fact that his father had asked him to call Kana Kalu and later on Kana Kalu had proceeded towards the wadi of the deceased. This fact appears to be quite minor in nature. However, ultimately it will turn out to be major inasmuch as there was no reason for Kana Kalu to accompany the deceased unless he was specifically called by the deceased. This will also raise a doubt regarding his presence at the time of the incident. As per the say of this witness, A2, A4,A5, A6 were having axe, A3 was having dharia while A7 was having stick and all of them attacked the deceased by inflicting blows with their respective weapons. If this part of his evidence is accepted, there are bound to be incised wounds all over the body. Dr. Arvind Popatlal, PW 3 Ex. 16 who has performed the post-mortem of the deceased, has found only four injuries as under:

(1) Extensive lacertaed wound from right temporal region to left side of the occipital region. Oblique reddish in colour. Brain matter was out.
(2) Contused lacertated wound over the middle of the head verticle in direction. 4"x2"x bone deep reddish in colour.
(3) An incised wound over the back of the chest at the lever of left renal angle 1 1/2"x1/2"x1" reddish in colour.
(4) Swelling over the left fore-arm 5"x3"x2" reddish in colour.

The doctor found other injuries by external examination of palpation as fractures etc.as under:

(1) Multiple fractures of the skull bone. Fracture of the right temporal parietal frontal occipital and left parietal bone.
(2) Fracture of the left radius and ulna at the middle.

According to Dr. Arvindkumar, injuries no.1,2 and 4 were possible by hard and blunt substance while injury no.3 was possible with sharp edged weapon. Thus, the evidence of the complainant Kana Kalu does not get support from the medical evidence.

7. As per the say of the complainant Kana Kalu, after the incident, he had gone to his wadi to inform his mother that the potters had killed Bababhai. However, he had not disclosed the names of all the accused. Similarly, he has also not disclosed the names of the accused to Goda, the son of the deceased and only told him that his father was murdered. Goda, in his evidence, has tried to improve his police version by stating that Kana Kalu had, in fact, told him that his father was murdered by Ghugha, A1 and eight others. However, Goda is confronted with his police version and the prosecution has successfully brought out that he was not conveyed the said information. Not only that, but Kana Kalu does not even disclose the names of the accused to Karna, the cousin brother of the deceased who immediately rushed to the scene of offence no sooner he was informed by Goda. Thus, Kana Kalu does not disclose the names of the assailants to any relatives of the deceased and discloses the names of the accused for the first time to the police at about 1.15 p.m. i.e. after more than five hours when he filed the complaint. This would raise a doubt regarding the presence of the accused as well as of the complainant at the time of the incident. The evidence of Kana Kalu is, thus, not free from doubt. This is contrary to the conduct of a reasonable and prudent man. If at all he had witnessed the incident, he would not like to miss to disclose the names of the assailants at the earliest point of time. Kana Kalu, in his cross examination, has admitted the suggestion that enmity between the potters and Ayars was going on since long. He has also admitted that prior to this incident, one potter Bhagwan Jiva was killed for which a case was registered against Kadu and Rasa Kadu wherein two sons of Nana Goga are also accused. In that case, the accused no.6 Megha Amba is also witness. This Kana Kalu has admitted in his cross examination that the deceased had a quarrel with A7 Bhima Shamji with regard to the boundaries of the land. He has also admitted that in that connection, complaint was also filed against deceased Baba Raghav. He was also informed that on the previous day of the present incident, Puna Shamji and Vallabh Shamji were injured in a beating incident who were also potters. A8 Ogha Shamji being the brother of Puna Shamji had taken Puna Shamji to the hospital. The aforesaid admitted position which has come on the record would go to suggest that there was previous enmity and the death of the deceased may not be the result of the present incident. Thus, the evidence of the complainant Kana Kalu, as stated above, is not free from doubt and, therefore, the same cannot be accepted on its face value.

The evidence of the complainant, as stated above, does not get corroboration from the medical evidence.

8. The prosecution, with a view to get some corroboration, has examined Loma Vajsur, PW 5 Ex.26. According to this witness, while he was travelling in a bus on 7.3.2000 from Chhapri to village Hajipur, he saw from the bus the accused sitting at the outskirts of village Hajipur with weapons like dharia, axe and sticks. After reaching Hajipur, he came to know about the murder of one Ayar. The evidence of this witness does not inspire any confidence. This witness does not remember the colour of the clothes of the accused. He has admitted that before the incident, there was no occasion to have any conversation with the accused. He has also admitted that he does not know the names of the accused. In the circusmtances, in absence of any identification parade, it would be too much to identify the accused. Even though he is not the relative of the deceased, he had stayed overnight at the residence of the deceased on the day of death of the deceased. This would render his evidence unnatural and, therefore, unacceptable. He has been examined only with a view to show the presence of the accused with weapons before the incident. In our opinion, his evidence is not at all believable and, therefore, it can safely be concluded that the evidence of the complainant Kana Kalu does not get corroboration from any independent evidence. Once the evidence of the sole eye witness is discarded, there remains hardly anything which would connect the accused with the commission of offence.

9. We have gone through the authorities cited by the learned APP to substantiate his submissions. There cannot be any dispute with regard to the principle laid down by the apex Court. We agree with the principle that conviction can be based on the testimony of a sole eye witness even without any corroboration. However, considering the facts of the present case, in our opinion, the evidence of Kana Kalu who is the sole eye witness is not acceptable and, therefore, the decision of the apex Court will be of no assistance to the submissions advanced by the learned APP.

10. In our opinion, the learned trial judge was justified in acquitting all the accused by rejecting the evidence of the complainant as well as other prosecution witnesses. Since we are in total agreement with the said reasonings and the ultimate conclusion reached by the learned judge, we see no merit in this appeal.The appeal fails and is dismissed. Bail-bonds stand cancelled.

(Kshitij R.Vyas,J.) (Kamal M.Mehta,J.)

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